

**EXAMINING THE FILIBUSTER:
HISTORY OF THE FILIBUSTER 1789-2008**

THURSDAY, APRIL 22, 2010

United States Senate,
Committee on Rules and Administration,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in Room SR-301, Russell
Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Udall, Bennett, McConnell, Chambliss, Alexander
and Roberts.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica
Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel;
Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden
Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Jones, Republican
Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican
Chief Counsel; Michael Merrell, Republican Counsel; Abbie Platt, Republican
Professional Staff; Trish Kent, Republican Professional Staff; and Rachel Creviston,
Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman Schumer. The hearing will come to order.

First, I would like to acknowledge the fact that Senator Bennett is planning to be
here but he will be a little late. So Senator Alexander is taking over the ranking

26 position until Senator Bennett gets here.

27 I thank my colleagues for being here. We will do opening statements and then
28 we will go to the witnesses.

29 So I want to thank everyone for coming. I want to thank Senator Bennett, of
30 course, and my other colleagues for participating in the hearing. I especially want to
31 thank two people. One is Senator Robert C. Byrd, who could not be here today, but I
32 want to thank him for his interest in our hearing and for the statement he is submitting
33 for the record. As we know, he is sort of the guardian of the Senate and the Senate
34 Rules, and Senator Byrd has shown an active role here.

35 At the other end of the spectrum, the person who really encouraged me and
36 convinced me that it was a good idea to have a series of hearings on this issue is Senator
37 Tom Udall of Mexico. He has not been here quite as long as Senator Byrd but we know
38 that he has the tremendous potential to be one of the people so knowledgeable about
39 how the Senate works and he is already an outstanding Senator.

40 This is the first in this series of hearing by the Rules Committee to examine the
41 filibuster. It is a topic we hear a lot about from our constituents, from our colleagues,
42 from the press. That is because filibusters and cloture motions have escalated in
43 recent year to unprecedented levels.

44 In the first half of the 20th Century filibusters and filibuster threats were
45 relatively rare events. From the 1920s through the 1950s, an average of about ten
46 cloture motions were filed per decade, and of course, not every cloture motion is to cut

47 off a filibuster.

48 That number almost tripled to 28 during the 1960s, the era of controversial civil
49 rights legislation. But after that, things really started to take off. A total of 358
50 cloture motions were filed in the 1990s and from 2001 to 2009 there were 435 cloture
51 motions filed.

52 Clearly the filibuster has changed over the years. Not only is it used a lot more
53 now but the threat of filibusters has become an almost daily fact of life in the Senate,
54 influencing how we handle virtually everything debated on the Senate floor.

55 The filibuster used to be the exception to the rule. In today's Senate, it is
56 becoming a straitjacket. So especially during the last decade there has been a lot of
57 interest and concern and frustration from both parties about where we are in terms of
58 getting things done in the Senate.

59 There are many people saying we need to change the rules to make it easier to
60 get cloture or to handle Senate business efficiently. Four such Senate resolutions have
61 been introduced in this Congress including one by our Rules Committee colleague,
62 Senator Udall, which we will hear about at future hearings.

63 Others say we should not change the rules. As chairman of the Rules
64 Committee, I intend to take a thoughtful, thorough approach to this topic.

65 Since I joined the Senate in 1999, I have seen the use of filibuster continue to
66 increase under both Republican and Democratic majorities. So it is not just one party
67 doing it. In 2005 we had a near crisis over the so-called nuclear or constitutional

68 option, a crisis that ended when a bipartisan group of senators came together to find a
69 middle ground.

70 The truth is both parties have a love-hate relationship with the filibuster
71 depending on if you are in the majority or in the minority at the time. But this is not
72 healthy for the Senate as an institution. The last Rules Committee hearing on the
73 filibuster was on June 5, 2003, under then Chairman Trent Lott. A resolution was
74 proposed by Majority Leader Frist to amend the Standing Rules of the Senate to allow a
75 simple majority of 51 votes to end debate on judicial nominees.

76 In reflecting on the substance of that hearing, it is clear that our statements on
77 whether or not to change the cloture rule usually coincided with whether or not we
78 were in the majority or the minority.

79 I was a member of this Committee in 2003 as were many of my colleagues here,
80 both Democrat and Republican. Not surprisingly the words we spoke then might not
81 reflect how we feel today when our majority and minority roles are reversed.

82 I am sure my colleagues could quote us opposing filibuster reform just as I could
83 quote them in favor of such reform. But that is not the point of these hearings.

84 The fact is that all of us on both sides of the aisle struggled with the same
85 questions. What does the Constitution say about ending debate or allowing unlimited
86 debate in the Senate? What does it say about how Senate rules can be changed?
87 What are the rights of the majority; what are the rights of the minority? When does
88 respect for the rights of the other members of this body become a disregard for the

89 needs of the majority of Americans to have us act?

90 We all know that those of us in the minority in one Congress will be in the
91 majority in another and vice versa. What we seek is a path towards civility,
92 deliberation, and consensus that eventually at the proper time leads to the best
93 decisions we can make collectively for our country.

94 Only by carefully exploring these issues can we answer the question: should we
95 change the Senate rules and if so, how and when. Knowing the history of debate in the
96 Senate and the efforts to limit it is the first step.

97 So we are starting our hearings today with an examination of the history of the
98 filibuster from 1789 to 2008. We will start at the beginning. What does the
99 Constitution say about the Senate? Since there was no procedural rule to cut off
100 debate for most of the 19th century, how did that affect decision-making in the Senate?
101 What eventually prompted adoption of the cloture rule in 1917 that for the first time in
102 the Senate allowed Senators by a two-thirds supermajority to vote and end debate?

103 Our witnesses will describe how the cloture rule and the filibuster were used
104 during the 20th Century in debates on civil rights and the push for filibuster reform in
105 the 1970s that lowered the threshold for cloture to 60 votes.

106 Finally, we will hear about the modern era of the Senate, including the impact of
107 filibusters and cloture motions in every decade since the 1970s as the use of the
108 filibuster escalated drastically.

109 Our historical overview will end in 2008 before the start of the current Congress.

110 Today's hearing will establish a common understanding for future hearings and
111 discussions. I hope that informs members of this Committee, the Senate and the
112 public at large about the development of the filibuster and efforts of the Senate over
113 more than two centuries to manage it and deal with its consequences.

114 In our next hearing we will look at the filibuster in this Congress, examining
115 issues such as whether it is more difficult for the Senate to complete its regular business
116 now than in previous eras and the impact of the filibuster on other branches of
117 government.

118 In subsequent hearings, we will hear about proposals for changes in Senate rules
119 related to the filibuster and consider what kinds of changes, if any, are needed.

120 I hope all of us on this Committee come to these hearings with an open mind,
121 willing to consider the ideas and suggestions presented to us. I look forward to
122 listening to our witnesses who have come to share their knowledge and experience with
123 us.

124 Now with the permission of the members, we are very honored to have Leader
125 McConnell with us and I would turn to him to make the first statement.

126 [The prepared statement of Senator Byrd follows:]

127 **OPENING STATEMENT OF SENATOR MCCONNELL**

128 Senator McConnell. Thank you very much, Mr. Chairman. I appreciate the
129 opportunity to be here and make some observations about this extremely important
130 topic.

131 Before giving my prepared comments, I would point out that I believe it was
132 Washington. It certainly was one of our founders who was quoted as saying at the
133 constitutional convention the Senate was going to be like the saucer under the tea cup,
134 and the tea was going to slosh out and cool off, and the Senate, he anticipated, would
135 be a place where passions would be reined in and presumably progress would be made
136 in the political center.

137 It seems to me if you look back over the 200-year history of our country, the
138 Senate has certainly forced solutions to the middle and most observers would argue
139 that has been good for the country.

140 We read the newspapers and I think understand what these hearings are about.
141 Some members of the Democratic conference would like to eliminate the Senate's
142 long-standing tradition of the freedom to debate and amend legislation.

143 This in turn would eliminate the requirement that controversial legislation
144 achieve more than just a bare majority support here in the Senate. It probably comes
145 as no surprise to anyone that I am not in favor of such a proposal. I never have been,
146 including more challengingly, of course, when I was in the majority.

147 The reason is best described by one of our Senate colleagues who once wisely

148 said the following, "Let us clearly understand one thing. The Constitution's framers
149 never intended for the Senate to function like the House of Representatives. The
150 Senate was intended to take the long view and to be able to resist, if need be, the
151 passions of the often intemperate House. Few, if any, upper chambers in the history
152 of the western world have possessed the Senate's absolute right to unlimited debate
153 and to amend or block legislation passed by a lower house. I have said that, as long as
154 the Senate retains the power to amend and the power of unlimited debate, the liberties
155 of the people will remain secure."

156 That, of course, was Senator Byrd. He delivered those remarks in 1997. He
157 was right then and he is right again when he reaffirmed his belief in those principles this
158 year.

159 Here is what he wrote in a dear-colleague letter, quote, "I believe that efforts to
160 change or reinterpreted the rules in order to facilitate expeditious action by a simple
161 majority are grossly misguided. The Senate is the only place in government where the
162 rights of a numerical minority are so protected. Majorities change with elections. A
163 minority can be right. A minority's views can certainly improve legislation. Extended
164 deliberation and debate are essential to the protection of liberties of a free people."

165 That was Robert Byrd this year.

166 Now why are some in Senator Byrd's own party proposing to disregard his
167 counsel? The most disingenuous thing I have heard is that the Senate's rules must be
168 changed so the, quote, "democratic process" will work.

169 I submit that the effort to change the rules is not about democracy at all. It is
170 not about doing what a majority of the American people want. It is about power.

171 If it were truly about doing what a majority of Americans wanted, the
172 Democratic majority in the Senate would not have muscled through a health spending
173 bill that a majority of Americans opposed and opposed by very wide margins.

174 When the bill finally passed the Senate by the narrowest of margins, 39 percent
175 of Americans favored it while 59 percent opposed it. Other surveys had similar results.

176 So this was not about giving the majority of Americans what it wanted. It was
177 about power. That is what this is about. It is about a political party or a faction of a
178 political party that is frustrated that it cannot do whatever it wants whenever it wants
179 precisely the way it wants to do it. That is what this is about.

180 So rather than throw out 200 years of Senate tradition and practice and throw
181 away the very principles of which Senator Byrd has reminded us, I would like to suggest
182 a less radical and more productive solution to those who would like the Senate to
183 function differently.

184 First, at the risk of sounding like Yogi Berra, the virtue of a supermajority
185 requirement for legislation is that a bill that passes enjoys supermajority support, which
186 helps ensure that most Americans will actually support it.

187 When the Democratic majority has reached out to the minority, which does not
188 mean trying to pick off a few Republicans, we have had success. I hope we can have
189 another one with the financial regulatory reform bill and in other areas, but that

190 requires the majority to meet us in the middle.

191 My second suggestion is not run the Senator floor like the House. The Senate's
192 tradition of freedom to amend has been a lot less free over the last few years.

193 Take a look at this chart and you will see, if I can see it, you will see that since
194 assuming control of the Senate the Democratic majority has been engaged in what my
195 friend the majority leader once called a very bad practice.

196 And according to CRS it has been engaging in it to an unprecedented extent.
197 What I am talking about is the majority repeatedly blocking Senators in the minority
198 from offering amendments by filling out the so-called amendment tree.

199 As you can see, the practice of filling up the amendment tree has gone up
200 dramatically in the last three years. All majority leaders have done it occasionally, but
201 this majority has done it to an unprecedented extent.

202 Senator Frist did it 12 times in four years. By contrast, Senator Reid has done it
203 more than twice as often, 26 times in a little over three years. In fact, the current
204 majority has blocked the minority from offering amendments almost as often as the last
205 five majority leaders combined.

206 I would say to my friends in the majority I know why, because members are
207 complaining about having to cast tough votes. They really hate it. And the leader of
208 the majority is always pounded upon. I remember having a similar experience when
209 we were in the majority. Members coming up and saying why do we have to cast all
210 these tough votes. Of course, the only way to avoid that is to shut the minority out by

211 filing up the tree and filing cloture.

212 So if the Democratic majority wants to generate inflated cloture vote numbers
213 for political purposes, well, go ahead and keep treating the minority as if they were
214 serving in the House.

215 But if you truly do not like all the cloture votes, then let your colleagues in the
216 minority offer amendments. True, there may be some votes you would rather not
217 cast, but that is not anything new.

218 What is new is the unprecedented extent to which the majority is avoiding have
219 to vote on amendments. As my good friend the majority whip likes to say, if you do
220 not like fighting fires, then do not become a fireman; and if you do not like casting tough
221 votes, then do not run for the U.S. Senate. That is Senator Durbin.

222 Finally some of the testimony states that one's view of the filibuster depends on
223 where one sits. It is true that I opposed filibustering judicial nominees; we opposed
224 that when we were in the majority. But I opposed doing so when I was in the minority
225 as well, that is, filibustering judges. And I opposed doing so regardless of who was in
226 the White House.

227 During the Clinton Administration, I put my votes where my mouth was and
228 repeatedly voted with my Democratic colleagues to advance a nominee, to invoke
229 cloture, if you will, when a minority of those in my party would not consent to do so,
230 even though I opposed the nominee and later voted against him or her. Not
231 surprisingly, I was also against my Democratic colleagues not giving President Bush's

232 judicial nominees an up or down vote.

233 In short, I was against expanding use of the filibuster into an area in which it
234 traditionally -- traditionally -- had not been used. One can agree with that view or not.
235 But it is one thing to disagree with expanding the use of the filibuster into a
236 non-traditional area regardless of who is the President and who is in the minority.

237 It is another thing to be for expanding the filibuster into judicial nominations
238 when one is in the minority, but to turn around and urge its elimination altogether
239 when one is in the majority.

240 When it comes to preserving the right to extended debate on legislation,
241 Republicans have been surprisingly consistent. On January 5, 1995, after having just
242 been voted into the congressional majority for the first time in 40 years, Senate
243 Republicans walked onto the Senate floor to cast their first vote. It was on Senator
244 Harkin's proposal to sequentially reduce the cloture requirement to a simple majority.
245 This is right after Republicans took control of both the House and the Senate for the first
246 time in 40 years. We were a rambunctious and a new majority.

247 Even though it was in our short-term legislative interest to support Senator
248 Harkin, all Republicans, every single one, voted against his proposal, every single one.
249 So did the current vice president, the current Senate Majority Leader and not
250 surprisingly, the current Senate president pro tem. That was the right position in 1995,
251 and it is the right position today.

252 In sum, the founders purposefully crafted the Senate to be a deliberate,

253 thoughtful body. A supermajority requirement to cut off the right to debate ensures
254 that wise purpose. Eliminating it is a bad idea.

255 Mr. Chairman, I want to thank you for allowing me to give my thoughts on this at
256 the beginning of the hearing, and I wish you well. I think this is an important subject,
257 and I commend you for holding the hearings.

258 Chairman Schumer. Thank you, Mr. Leader, and you are welcome at any time
259 to take part in what will be a series of hearings on this issue.

260 Senator Udall.

261 **OPENING STATEMENT OF SENATOR UDALL**

262 Senator Udall. Thank you, Chairman Schumer, and thank you for your kind
263 statements in your opening and thank you for holding this hearing.

264 Filibuster reform is an issue that has received a great deal of attention recently.
265 Today's hearing as well as future hearings will allow us to take a rational and
266 deliberative approach to reforming not just the filibuster but, other rules that are
267 hampering this body. Today is about looking at our past, but also provides guidance
268 for the future.

269 Critics of reforming the filibuster argue that it will destroy the uniqueness of the
270 Senate. They say it will turn the Senate into the House of Representatives.

271 But today we will hear that the filibuster has been amended over the years, and
272 this body not only survived the reforms, but was better for them. We will hear from
273 our witnesses about the creation of the cloture rule in 1917 and the history of its

274 reforms over the many decades.

275 I would like to focus on one part of that history. In the 1940S and 1950s, the
276 civil rights debate was raging in the Senate and a minority of Senators opposed to the
277 legislation were regularly using the filibuster as a weapon of the obstruction.

278 In 1953, a bipartisan group of Senators decided they had had enough. Led by
279 my predecessor, New Mexico's Clinton Anderson, they attempted to reform the
280 filibuster. Article 1 Section 5 of the Constitution states that each house may determine
281 the rules of its proceedings.

282 As such, Anderson argued that any rule adopted by one Senate that prohibits a
283 succeeding Senate from establishing its own rules is unconstitutional. But this is
284 precisely what Rule 22 does.

285 Currently we are operating under rules approved by a previous Senate that
286 require an affirmative vote of two-thirds of Senators to end a filibuster on any rules
287 change.

288 Anderson's argument became known as the constitutional option, which I
289 believe is very different from the nuclear option. On the first day of Congress in 1953,
290 Anderson moved that the Senate immediately consider the adoption of rules for the
291 Senate of the 83rd Congress.

292 His motion was tabled, but he introduced it again at the beginning of the 85th of
293 Congress. In the course of that debate, Senator Hubert Humphrey presented a
294 parliamentary inquiry to Vice President Nixon, who was presiding over the Senate.

295 Nixon understood the inquiry to address the basic question, do the rules of the
296 Senate continue from one Congress to the next. Noting that there had never been a
297 direct ruling on this question from the chair, Nixon stated, and I quote, "Any provision of
298 the Senate rules adopted in a previous Congress which has the expressed or practical
299 effect of denying the majority of the Senate in a new Congress the right to adopt rules
300 under which it desires to proceed is, in the opinion of the chair, unconstitutional." End
301 quote.

302 Despite Nixon's opinion, Anderson's motion again was tabled. Anderson raised
303 the constitutional option once more at the start of the 86th Congress, this time with the
304 support of more than two dozen Senators. But to prevent Anderson's motion from
305 receiving a vote, Majority Leader Johnson came forward with his own compromise.

306 He proposed changes to Rule 22 to reduce the required vote for cloture to
307 two-thirds of Senators present and voting.

308 As our witnesses will discuss, this was not the last change to the filibuster rule.
309 Reform efforts have continued and occasionally succeeded since 1959. The
310 constitutional option has served as a catalyst for change. As the junior Senator from
311 New Mexico, I have the honor of serving in Clinton Anderson's former seat, and I have
312 the desire to continue his commitment to the Senate and his dedication to the
313 principles that in each new Congress the Senate has the constitutional right to
314 determine its own rules by a simple majority vote.

315 It is time again for reform. There are many great traditions in this body that

316 should be kept and respected, but stubbornly clinging to ineffective and unproductive
317 procedure should not be one of them.

318 We should not limit our reform efforts to the filibuster, but look at all the rules.
319 We can, and should, ensure that minority rights are protected and that the Senate
320 remains a uniquely deliberative body but we must also ensure it is a functional body,
321 regardless of which party is in the majority.

322 Thank you again, Mr. Chairman. I am looking forward to these very important
323 hearings.

324 Chairman Schumer. Senator Alexander.

325 **OPENING STATEMENT OF SENATOR ALEXANDER**

326 Senator Alexander. Thanks, Mr. Chairman. Thanks for having the hearing.

327 President Lyndon Johnson called the Republican minority leader, Everett Dirksen
328 every afternoon at 5 PM not for any particular reason. That was the kind of
329 relationship that they had even though Senator Dirksen had fewer Republican Senators
330 on his side then than Senator McConnell has today.

331 Why did he do that? The civil right bill, Senator Udall mentioned the civil rights
332 bills provided maybe an answer to that. I think it is because the President knew that
333 not only did he need to get the civil rights bills passed--he had already passed one when
334 he was majority leader--but in 1964 and 1968 he needed to get the country to accept
335 them.

336 We have seen with health care debate that, as soon as it was passed by a bare

337 majority, suddenly all over the country there is a campaign to repeal it. Lyndon
338 Johnson I think wanted to avoid that in an even more controversial set of legislations.

339 So he had the bills written in 1964 and 1968 in the Republican leader's office.
340 He had to get 67 votes to pass those bills. That was inefficient. A Democratic
341 majority could have pushed it through but maybe the founders were wise to say that
342 there ought to be a process here of checks and balances in Washington, that in this big
343 constitutionally decentralized country that we need, when we make big changes, to
344 present the American people with something in which they have confidence.

345 I think of the financial reform bill today. Senator Chambliss is working on that.
346 We need certainty in our country in financial matters. I cannot think of a better way to
347 do it than for the President to come out with a large number of Republicans and
348 Democrats and say, okay, we are going to rewrite the rules and these are going to be
349 the rules for the next five or ten years because we have a consensus on it. I think that
350 would be important to the world. It might be the tipping point in terms of helping the
351 economy get going again.

352 So the majority has a choice. Do we ram it through or do we get consensus?
353 Alexis de Tocqueville wrote the book that most Americans think is the best book on the
354 American democracy, and in it he saw two great threats down the road to the American
355 democracy. He wrote this in the 1830s as a very young man.

356 One was Russia. He was awfully right about that. The other was what he
357 called the tyranny of the majority. He wondered how a purely democratic country

358 would work, whether it would overrun the ideas of the minority. That is why we have
359 the United States Senate, to provide those checks and balances.

360 Senator Schumer talked about the number of times the minority obstructs
361 legislation. We in the minority could say it another way. We could say that is the
362 number of times the majority has tried to cut off our right to debate, our right to offer
363 amendments which is the essence of the Senate.

364 The only thing different about the Senate is the almost absolute right of
365 unlimited debate and unlimited amendment, and if you get rid of that, you get rid of the
366 Senate.

367 Senator Reid's book, the Majority Leader, Chapter 7, that he wrote recently.
368 This is what he said about the Republican majority leader.

369 "I could not believe Bill Frist was going to do this. He decided to pursue a rules
370 change," said Senator Reid, "that would kill the filibuster for judicial nominations.
371 Once you open that Pandora's box, it is just a matter of time before a Senate leader who
372 could not get his way on something moved to eliminate the filibuster for regular
373 business as well and that simply put would be the end of the United States Senate."

374 It would be, and I think it is very helpful to have the history here. Before we get
375 bogged down in different rules and different current events, I think we need to
376 understand what James Madison meant when he talked about a fence, a necessary
377 fence against the danger of passion in the country of the Democratic majority.

378 Senator Byrd's comments in his orientation comments to new Senators in 1996.

379 "Let us clearly understand one thing. The Constitution's framers never intended the
380 Senate to function like the House of Representatives."

381 I saw in the newspaper it said a third of the Democratic Senators today are in
382 their first term. I am sure for a new Senator full of vim and vigor the idea is let us get
383 things moving, let us get things going.

384 But we saw in the so-called nuclear option a few years ago when Republicans
385 tried to do just exactly what Senator Udall said, cooler heads prevailed and said we do
386 not want to do that. I do not want to create a Senate that is incapable of requiring a
387 consensus on major issues so the country will have confidence in what is being done in
388 Washington.

389 Senator Byrd said in his letter on February 23rd of this year, I hope the Senators
390 will take a moment to recall why we have extended debate and amendments. The
391 Senate is a place in government where the rights of a numerical minority are protected.
392 Minorities change with elections. A minority can be right and minority views can
393 certainly improve legislation.

394 Mr. Chairman, I ask unanimous consent since my time is now up to include the
395 record Chapter 7 of Senator Reid's book, called The Nuclear Option. I think it provides
396 a useful perspective, and I would like to include in the record also the remarks of
397 Senator Byrd at the orientation of new Senators. He used to do that every time. He
398 has not been able to do it the last couple of times. But it is a remarkable expression of
399 understanding of why we have a Senate and why we require a consensus instead of a
400 majority. I bought enough copies for every member of the Committee if they would
401 like to have one.

402 Thank you, Mr. Chairman, for holding the hearing.

403 Chairman Schumer. Thank you, and I thank you for the statement.

404 Would Senator Roberts, Senator Chambliss like to make opening statements?

405 Senator Roberts was here first and then Senator Chambliss.

406 Senator Roberts. Thanks to the thoughtful and careful Chairman of the
407 Committee for holding this hearing to examine the role of the Senate and the legislative
408 process. I am currently in my third term as a Senator.

409 Chairman Schumer. Excuse me. Without objection, Senator Alexander's
410 additions will be added to the record.

411 Senator Alexander. Thank you.

412 Chairman Schumer. Sorry to interrupt.

413 [The information follows:]

414 / COMMITTEE INSERT

415 OPENING STATEMENT OF SENATOR ROBERTS

416 Senator Roberts. No problem. I am currently in my third term as a Senator.

417 Before this, I served in the House of Representatives for eight terms for 16 years as the
418 Congressman for Kansas's big First District.

419 We were in the minority for so many years my main role was to set picks for the
420 Chairman during basketball contests. We Republicans never got to get the ball to
421 shoot but we were always instructed to pass it.

422 Chairman Schumer. If the gentleman would yield. He was the best “pick
423 setter” that I have ever come across in my 59 years of playing basketball.

424 Senator Roberts. I have retired as a result of that as a matter of fact.

425 [Laughter.]

426 Senator Roberts. But as such I have had first-hand experience in both the
427 houses of Congress, their rules and their respective constitutional roles. I might add
428 two years as administrative assistant for Frank Carlson, who was a great friend of
429 Clinton Anderson of New Mexico, and basically 12 years as an aid to my predecessor in
430 the House. So as bucket totter or a staff member I think I pretty well covered the
431 waterfront.

432 This hearing is about more than the filibuster. It seems to me it is about the
433 institutional role of the Senate and its function in the legislative process.

434 It is clear that the founding fathers intended to create a system of checks and
435 balances. The legislative upon the executive. The judicial upon the legislative. And

436 even within the Congress, the Senate upon the House.

437 I served as a Congressman in both the majority and the minority. I can testify
438 that the majority is better. I can testify firsthand that the House is the institution for
439 the will of the majority.

440 However, I think it is useful to highlight some recent trends in the House
441 operations in order to distinguish the importance of the Senate.

442 From the 104th Congress to the 109th, a period of 12 years, the percentage of
443 bills brought to the floor with an open amendment rules range from 58 percent in the
444 104th to 19 percent in the 109th, with an average over the entire period of about 41
445 percent, almost 50.

446 By contrast, the number of bills with open amendment rules on the floor in the
447 110th Congress was 14 percent and one percent, one percent as of March 19 in this year
448 in the current Congress with an average of seven and half percent overall in three years
449 and four months.

450 So as the open amendment process atrophies in the House, the percentage of
451 closed rules has inevitably soared. In the 104th Congress to the 109th, the percentage
452 of bills brought to the floor with closed rules range from 14 percent in the 104th to 32
453 percent in 109th with an average over the period of 22 and a half percent.

454 By contrast, the number of bills with closed rules on the floor in the 110th
455 Congress was 36 percent and then an unprecedented 31 percent as of March 19 as of
456 this year in the current Congress with an average between the two of 33 and a half

457 percent.

458 These numbers, Mr. Chairman, demonstrate the level of cooperation in the
459 House has dropped precipitously, if not off the cliff. It is most striking because public
460 opinion polls are overwhelmingly opposed to the legislation coming out of the Congress
461 if you believe the polls and you think that is important.

462 I understand fully that the motivation of individual members and their agenda or
463 their ideology plays an important role, and different parties think obviously in regards to
464 the importance of legislation or the agenda and that public polls should be considered
465 but certainly should not be the deciding factor.

466 But in its most recent average of polling data from different sources, Real Clear
467 Politics, that is an outfit that is an independent nonpartisan polling institute, shows that
468 nearly 53 percent of Americans are opposed to the recently passed Health Care Reform
469 bill and only 40 percent roughly are in favor of it.

470 I know that either party would explain if we could explain it more they would be
471 for it,\; and the other party would say if you explain it more, more would be against it.
472 I understand that.

473 But at any rate, only 40 percent roughly were in favor of it. We could discuss
474 other controversial proposals that have happened in the past. The American people
475 oppose like the cap and trade, immigration, federal bailouts, deficit spending.

476 But it might be easier to sum it all up in a real clear politics average of polls on
477 whether Americans feel the country is headed in the right direction. The most recent

478 poll average shows that almost 60 percent of Americans think we are on the wrong
479 track. Only 37 percent roughly think we are on the right track.

480 There is a clear disconnect at least publicly or in the image and the polling
481 between what is being pursued and what the American people want.

482 To whom can the American people turn when the House majority runs rough
483 shod over the minority and public opinion. You can go back to the New Deal or you
484 can go back to the Great Society or you can go back to eight years under Eisenhower or
485 you can go back to any period of history and say the same kind of thing.

486 The answer is the Senate. The founding fathers had the foresight to create an
487 institution that was based not on majority rule but where each state regardless of size
488 or population had two Senators to speak out on their behalf. It is that power to speak,
489 the right to unlimited debate that is the hallmark of this body.

490 The 63rd article from the federalist papers attributed to James Madison explains
491 the necessity of the Senate as an institution that, quote, "sometimes be necessary as a
492 defense to the people. What bitter anguish would not the people of Athens have
493 often escaped if their government had contained so provident a safeguard against the
494 tyranny of their own passions. Popular liberty might then have escaped the indelible
495 reproach of decreeing to the same citizenry the hemlock on one day and statues on the
496 next."

497 I might also indicate, Mr. Chairman, that if you erect a statute on one day you
498 might find a lot of pigeons on the next day.

499 I know, Mr. Chairman, I have several other comments to make. Perhaps I
500 should simply insert that in the record or, if the Chairman grant me, I would try to
501 expedite this very quickly. It is the Chairman's call.

502 Chairman Schumer. The gentleman's time is the extended.

503 Senator Roberts. The filibuster is the essence of the Senate. It is not a tool of
504 obstructionism or dysfunction. It is meant to foster greater consultation, consensus
505 and cooperation between the parties. It is a means for the minority to make its voice
506 heard and to contribute to debate and amend legislation before the Senate.

507 In this way, it is impossible to abuse the filibuster because it is an expression of
508 the people against majority's attempt to shut them out of the process. Only in the
509 House does the majority take all. And as the numbers show, the majority appears to
510 be taking, if not devouring, more and more in the last few years. It is disheartening to
511 see some members of the Senate, often new and unaccustomed to culture of comity
512 and compromise, attempt to rewrite the rules of this chamber to be more like the
513 House.

514 Cloture is an instrument to cut off debate when the majority is not interested in
515 compromise. From the 107th to the 109th Congress, there were an average of 57
516 cloture motions filed per Congress. In the 110th Congress alone there were 152.
517 That is 152 instances of the majority seeking to cut off debate.

518 It is a 267 percent increase over the average over the previous three Congresses.
519 Of those 152 cloture motions, 97 were filed the moment the question was raised on the

520 floor. That is nearly 64 percent cloture motions were filed before a debate was even
521 allowed to take place. The average for the previous three Congresses was 29 percent.

522 We need to consider, Mr. Chairman, the times the majority brought a bill to the
523 floor and used a parliamentary tactic called filling the tree to prevent the minority from
524 offering amendments.

525 From the 99th to the 109th Congress, a period of 22 years, the majority filled the
526 tree a total of 36 times, averaging a little over three per Congress. This contrasts
527 sharply with 110th to the present Congress, a period of roughly three years and four
528 months in which the majority filled the tree 26 times with an average of 13 times per
529 Congress.

530 We could go on and on with other instruments that have been used by the
531 majority to circumvent regular order in the past and in the present, stifle the majority,
532 and force unwanted legislation on the people.

533 They include the abuse of the reconciliation process. Mr. Chairman, I
534 remember trying to get order to introduce and explain in one minute an amendment
535 that you offered and that was passed in the Finance Committee, trying to point out it
536 was bipartisan and having agreement other than members shouting regular order when
537 I reached the end of my comments, and yet it was defeated on a party line vote.

538 That is just not right. It really is not right. Both of us agreed on the merits of
539 the proposal and yet during reconciliation that was not possible, at any rate by
540 bypassing the Committee through the use of the Rule 14 and the use of the

541 amendments between the houses also known as ping-pong instead of conference
542 committees to resolve differences in the legislation.

543 I might add as a conferee on the farm bill there were 61 members. I think I
544 would have preferred ping-pong at that particular moment.

545 The filibuster, the right of unlimited debate is synonymous with the Senate. It
546 is what the founders intended. I have several quotes from current members and I
547 think we have already had the intent of that so I will skip through that, except for
548 Senator Kennedy who on May 5, 2005, said, "The Senate rules have allowed the
549 minority to make itself heard as long as necessary to stimulate debate and compromise
550 and even to prevent actions that would undermine the balance of powers or that a
551 minority of Senators strongly oppose on principle. In short, neither the Constitution
552 nor Senate rules nor Senate precedents nor American history provide any justification
553 for selectively nullifying the use of the filibuster."

554 Chairman Schumer. Thank you, Senator Roberts.

555 Senator Chambliss.

556 OPENING STATEMENT OF SENATOR CHAMBLISS

557 Senator Chambliss. Thank you very much, Mr. Chairman. Thanks for holding
558 this hearing. I am pleased to have the opportunity this morning to address the need to
559 protect the fundamental role of this sacred legislative body.

560 Our Nation's history is not only riddled with evidence of the intent of the framers
561 to preserve the intended differences and structural or procedural design of the House

562 and the Senate but also examples of our government's lawmaking powers where these
563 differences have preserved and had protected the voice of the minority.

564 There are those that may argue that the creation of the filibuster is not so rooted
565 in the framers design of this institution but rather evolved over the early course of our
566 history unintentionally.

567 While some evidence may infer such an argument about the technical evolution
568 of the filibuster and the Senate rules, the concept of a single legislative branch divided
569 among two houses in electoral duration, representative composition, and rule-making
570 procedure could not have been more prevalent or purposefully on the minds of our
571 founders and later historical giants of the Senate. These things all the filibuster serves
572 to protect.

573 Having begun my tenure in the United States Congress as a member of the
574 House of Representatives and now serving my second term in the Senate, I am both
575 sorely and fondly aware of the differences and legislative process between both houses
576 of Congress.

577 One of the certainties of the Senate body is a frustration of the majority in the
578 minority's right to protect from a repressively enacted agenda at complete disregard of
579 the minority will.

580 Dysfunctional, gridlocked, stymied are often unavoidable characterizations of a
581 majority's inability to move a one-sided partisan agenda through this legislative body
582 without impediments.

583 However, it is these legislative hurdles that are the reason this body is regarded
584 as a guardian of checks and balances, and separation of powers. Any reform effort
585 which attempts to weaken the protections of minority rights and further enable
586 fast-tracked legislating threatens not only the balance of our bicameral design but also
587 the separation of powers within a single party majority among executive and legislative
588 branches.

589 It is no secret that the filibuster can be the majority's greatest enemy and a
590 minority's best friend. Yet it is most important to remember this when the political
591 winds shift, and once majority party finds itself in the minority.

592 There are a few party purists on the hypocrisy of blaming the other side of the
593 aisle for obstructionism or a party of no. But we must strive to see past a polarizing
594 politics and recall that both sides serve in an institution that was designed for purposes
595 of balance, that but for the flaws of impetuous men, limitations would not be necessary,
596 that rules to govern how we govern protect the rights of those we are sent here to
597 represent.

598 In the face of misguided calls for reform of Senate procedure, I am often
599 reminded not only of Madison's description of the need for the Senate to service as an
600 anchor of government but also that of Jefferson's exclamation that that government
601 which is best governs least.

602 And I would yield the rest of my time to Senator Roberts if he wants to enter his
603 quotes, Mr. Chairman, or I would yield back to you, whichever your prefer.

604 Chairman Schumer. I think I prefer you yielding back to me. But we will add
605 anything Senator Roberts wishes to add for the record.

606 Senator Roberts. Mr. Chairman, I would just say, and this is a personal
607 statement. I did not write this out. But if you look back in the history of the House
608 Agriculture Committee, the sometimes powerful House Agriculture Committee, you will
609 find Stenholm Roberts amendments so prevalent probably more of those than any other
610 in 20 years, and then we had the revolution and all of a sudden it was Roberts Stenholm.
611 There was the difference.

612 Charlie and I worked together. He was a great Democrat Congressman, and I
613 have never used the word "Democrat". He was just a great Congressman. I will not
614 say how he referred to me.

615 But at any rate we knew on the Ad Committee we either had to hang together or
616 hang separately. I think that was the way I tried very hard to represent Kansas.

617 Came to the Senate. There were some trying times in House when we had the
618 bank and the restaurant and the post office and all of that, and I understand all of that,
619 and it became very partisan.

620 But you come to the Senate and I must admit in this last year its been terribly
621 frustrating. I serve on the Health Committee. I serve on the Finance Committee.
622 You know about the jurisdiction of those Committees. You know the hours we put in.
623 I even put them in when I had pneumonia.

624 And eleven amendments on rationing, could never get them done, never made
625 an order. Always some parliamentary situation. Tried on reconciliation. Could not
626 get there.

627 It is a situation where those of us in the minority who have worked in the past
628 both in the majority and in the minority have come to feel that we have been shut out.

629 I know that other people feel the same way when they have been in that kind of
630 situation. But suiting up for the ball game and the coach never sends you in, that is
631 something that you do not like to see.

632 So from my standpoint I would really hope that we would, regardless of what we

633 do in terms of alleged reform, let us see what lurks behind the banner of reform or if
634 you wave that banner, you can be hoisted on your own petard.

635 Chairman Schumer. Thank you, Senator.

636 Let me just say before we go to our witnesses, there is large frustration on both
637 sides and we are trying to handle these hearings in not a partisan way but in a way to try
638 to break through that, and each side has legitimate concerns, very lofty concerns by my
639 four colleagues here.

640 They are a little less lofty when you realize things like the Marine Mammal
641 Commission is filibustered, members to that, members to the Tennessee Valley
642 Authority (TVA) board of directors, the member of the Farm Credit Bureau
643 Administration even after they passed out of Committee by unanimous votes.

644 So there is frustration on both sides, and maybe these series of hearings, and
645 that is what we are going to have, can break through that.

646 I understand yours. I think you understand ours. But to just continue in this
647 direction, I think, will not make any of us more effective Senators, more effective
648 Senators. So that is the purpose of the hearing.

649 And you still set good picks.

650 I am now going to call on our witnesses and introduce them.

651 Our witnesses today are Dr. Sarah Binder. She is a Senior Fellow at the
652 Brookings Institution, as well as Professor of Political Science at George Washington
653 University where she specializes in Congress and legislative politics. She is the author

654 of several books including, *Stalemate: Causes and Consequences of Legislative Gridlock*.

655 Dr. Gregory Wawro is an Associate Professor in the Political Science Department
656 at Columbia University. He is the co-author of the book, *Filibuster:: Obstruction in*
657 *Lawmaking in the U.S. Senate*. He did his undergraduate work at Penn State and
658 received a PhD at Cornell.

659 Dr. Dove, someone we all know and welcome back, has served as Senate
660 Parliamentarian for 13 years and now holds the title of Parliamentarian Emeritus of the
661 Senate, and is a Professor at GW Graduate School of Political Management, and counsel
662 to the law firm Patton Boggs.

663 Dr. Stanley Bach was Senior Specialists in Legislative Process for the
664 Congressional Research Service for over 25 years. Since retiring, he served as a
665 consultant in parliamentary development and legislative strengthening programs to
666 governments around the world. A 2005 paper he authored on the rules of procedure
667 for nationalist assemblies was used in Iraq.

668 I thank the witnesses for being here. I thank them for listening to our
669 statements which I think again were heart-felt but also well done. You may each
670 proceed. I think we will proceed from my left to my right. So you may begin Ms.
671 Binder. Your entire statements will be read into the record. If you could try to limit
672 your comments to five minutes. I am not going to be quite as lenient with you as I was
673 with Senator Roberts. Each has seven minutes, excuse me, seven minutes.

674 **STATEMENT OF SARAH A. BINDER, DEPARTMENT OF POLITICAL SCIENCE, GEORGE**

675

WASHINGTON UNIVERSITY

676

Ms. Binder. Thank you, Chairman Schumer, Ranking Member Alexander,

677

members of the Committee. I appreciate the opportunity to testify today about the

678

filibuster.

679

I want to offer three arguments. First, historical lore says the filibuster was part

680

of the original design of the Senate. Not true. When we scour early history, we

681

discover that the filibuster was created by mistake.

682

Second, we often call the 19th Century Senate a Golden Age of the deliberation

683

but the Golden Age was not so golden. Senate leaders the 1840s were already trying

684

to adopt a cloture rule but most such efforts to bar the filibuster were themselves

685

filibustered.

686

Third, creation of the cloture rule in 1917 was not a statement of the Senate's

687

love of supermajority rules. Instead it was the product of hard-nosed bargaining with

688

an obstructive minority. Short-term, pragmatic politics shaped contests to change

689

Senate Rules.

690

Allow me to elaborate. First on the origins of the filibuster, we have many

691

received wisdoms about the filibuster. Most of them turn out not to be true. The

692

most persistent myth is that the filibuster was part of the founding fathers

693

constitutional vision for the Senate. It is said the upper chamber was designed to be a

694

slow moving deliberative body that cherished minority rights.

695

In this version of history, the filibuster was a critical part of the framers' Senate.

696 But when we dig into history of Congress, it seems the filibuster was created by mistake.
697 The House and Senate rule books in 1789 were nearly identical. Both rule books
698 included what is known as the previous question motion. The House kept their
699 motion. Today it empowers a majority to cut off debate. The Senate no longer has
700 that rule.

701 What happened to that rule? In 1805 Vice President Aaron Burr, freshly
702 indicted for murdering Hamilton, was presiding over the Senate and he offered this
703 advice. He said something like this.

704 You are a great deliberative body but a truly great Senate would have a cleaner
705 rule book and yours is a mess. You have lots of rules that do the same thing. And he
706 singles out the previous question motion.

707 Today we know a simple majority in the House uses the motion to cut off debate
708 but in 1805 neither chamber used the rule that way. Majorities were still
709 experimenting.

710 And so when Aaron Burr said, "Get rid of the previous question motion," the
711 Senate did not think twice. When Senators met in 1806, they dropped the motion
712 from the rule book. Why? Not because Senators we think in 1806 sought to protect
713 minority rights and extended debate. They seemed to get rid of the rule by mistake
714 because Aaron Burr told them to.

715 Once the rule was gone, Senators still did not filibuster. Deletion of the rule
716 made possible the filibuster because the Senate had no rule to cut off a majority by

717 debate. It took several decades until the minority exploited lax limits on debate
718 leading to the first real live filibuster in 1837.

719 Second, the not so Golden Age of the Senate. Conventional treatments of the
720 Senate glorified the 19th Century as the Golden Age. We say filibusters were reserved
721 for great issues of the day and that all Senators cherished extended debate.

722 That view I think misreads history in several ways. First, there were very few
723 filibusters before the Civil War. Why so few? First, the Senate operated by majority
724 rule. Senators expected matters would be brought to a vote. Second, the Senate did
725 not have a lot of work to do in those years so there was plenty of time to wait out the
726 opposition. Third, voting coalitions in this early Senate were not nearly as polarized as
727 they would later become.

728 That changes by mid-century. The Senate grew larger, more polarized. It had
729 more work to do. And people started paying attention to it. By the 1880s almost
730 every Congress began to experience at least one bout of obstructionism over civil rights,
731 election law, even appointment of Senate officers, not all of these great issues of the
732 date.

733 There is a second reason the Senate was not in a Golden Age. When filibusters
734 did occur, leaders tried to ban them. Senate leaders tried and failed repeatedly over
735 the course of 19th and early 20th Centuries to reinstate the previous question motion.

736 More often than not, Senators gave up on their quest for filibuster reform when
737 they saw that opponents would kill it by filibuster because it would put the majority's

738 other priorities at risk.

739 Instead, leaders adopted innovation such as the unanimous consent agreements,
740 a fallback for managing a chamber prone to filibuster.

741 Third, the adoption of cloture. Why was reform possible in 1917 when it had
742 eluded leaders for decades and why did the Senate choose a supermajority cloture rule
743 rather than simple majority cloture?

744 First, the conditions for reform. After several unsuccessful efforts to create a
745 cloture rule in the 1900s, we get a perfect storm of March 1917. A pivotal issue, a
746 President at the bully pulpit, a very attentive press, a public engaged in that fight for
747 reform.

748 At the outset of World War I, Republican Senators successfully had filibustered
749 President Wilson's proposal to arm merchant ships, leading Wilson in March that year to
750 famously brand obstructionists, quote, a little group of wilful little men.

751 He demanded the Senate create a cloture rule, and the press dubbed the rule a
752 war measure, and the public (with all due respect) burned Senators in effigy around the
753 country.

754 Adoption of Rule 22 occurred because Wilson and the Democrats framed that
755 rule as a matter of national security. They fused procedure with a policy and they used
756 the bully pulpit to shame Senators into reform.

757 Second, why did Senators select a supermajority rule? A bipartisan committee
758 met that year to negotiate the form of the rule. Five of six Democrats wanted a simple

759 majority rule. One Republican wanted a supermajority rule. One Republican wanted
760 no rule.

761 So negotiators cut a deal. Cloture would require two-thirds of Senators voting.
762 Opponents promised not to block the proposal and supporters promised to give up on
763 their own plan for simple majority cloture, a proposal that had the support of roughly 40
764 Senators. The cloture rule was then adopted 76 to three.

765 We can draw at least three lessons from this history. First, the history of
766 extended debate in the Senate belies the received wisdom that the filibuster was an
767 original constitutional feature of the Senate. The filibuster is more accurately viewed
768 as the unanticipated consequence of an early change in Senate rules.

769 Second, there are conditions that can lead a bipartisan supermajority to agree to
770 change the rules. However, the minority often holds the upper hand in these contests,
771 given the high barrier to reform imposed by Senate rules.

772 Third, and finally, Senators in 1917 chose a supermajority cloture rule because a
773 minority blocked more radical reform. Short-term pragmatic considerations almost
774 always shape the contest over Senate rules.

775 Thank you.

776 [The prepared statement of Ms. Binder follows:]

777 Chairman Schumer. Thank you, Ms. Binder.

778 Mr. Wawro.

779 **STATEMENT OF GREGORY J. WAWRO, ASSOCIATE PROFESSOR,**

780 **DEPARTMENT OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY**

781 Mr. Wawro. Chairman Schumer, Ranking Member Alexander and members of
782 the Committee. I appreciate the opportunity to participate in this hearing and
783 contribute to the discussion of history of the filibuster.

784 I have been asked to discuss the period from 1917 to 1975 a critical period in
785 history of the filibuster that is book-ended by two major reforms in the Senate the first
786 being the adoption of the cloture rule in 1917, which has been very ably discussed by
787 Professor Binder -- and the second being the reform in the 1975 that lowered the
788 cloture threshold to three-fifths of the Senate.

789 During this period, the use and perception of filibusters in the Senate changed
790 significantly. Prior to this period, parliamentary obstruction was viewed as less than
791 legitimate, and Senators rarely resorted to it. Between 1917 and 1975, the filibuster
792 became deeply embedded in the fabric of the institution and became accepted by
793 Senators as a legitimate tactic for shaping the course of law making.

794 Filibusters expanded in scope and number and were employed by a broad range
795 of Senators on an ever widening array of legislation. Still, it is important to keep in
796 mind that filibusters remained relatively few in number when compared to the
797 contemporary Senate.

798 Three important qualitative changes in the use of filibusters occurred during this
799 period. The first was the use of the filibuster to inhibit repeatedly and systematically
800 the passage of a specific class of legislation, namely, civil rights reform.

801 The second was the development of the strategy of using filibusters to
802 consistently block efforts to reform rules concerning filibusters. The third was the
803 extension of filibusters to Supreme Court nominations.

804 I will focus on the first two changes in my statement today but would be happy
805 to discuss the third if any Committee members have questions about it.

806 While filibusters undoubtedly altered the course of law making in important
807 ways, it cannot be said that they rendered the Senate dysfunctional during this period.
808 Despite the quantitative and qualitative expansion in the use of the filibuster, the
809 Senate still managed to enact significant legislation addressing some of the most
810 pressing problems of the day.

811 Evidence indicates that Senators generally built larger coalitions in support of
812 legislation in order to preempt the use of filibusters. The substantial ideological
813 overlap that existed between the parties at this time in part made it easier to build
814 larger coalitions.

815 Nevertheless, the adoption of the cloture rule, Rule 22, in 1917, which required
816 two-thirds of Senators present and voting to end debate, did not make it necessary to
817 legislate by supermajorities. Although the percentage of significant laws that were
818 passed with fewer than two-thirds coalitions in favor declined, many pieces of
819 significant legislation were enacted by fairly narrow majorities in the decades following
820 the reform.

821 Opponents of a bill did not always resort to filibustering nor was it assumed that

822 cloture would have to be invoked routinely on significant and controversial legislation --
823 with civil rights bills constituting the key exception.

824 Even when minorities conducted filibusters, it was not always necessary to
825 invoke cloture since proponents could engage opponents in a war of attrition to wear
826 them down, forcing them to relent and allow legislation to move forward.

827 As such, majorities that fell short of two-thirds but felt more intensely about
828 legislation than the relevant minority could generally still manage to change policy.
829 This is the key difference between the impact of the filibuster during the period in
830 question and the impact of the filibuster in the contemporary Senate.

831 The extreme demands on both the agenda of the Senate and the personal
832 schedules of individual Senators mean that it is no longer a viable strategy to fight
833 extended wars of attrition to overcome an obstructive minority.

834 Although the filibuster was used relatively infrequently during this period, its
835 repeated use against civil rights legislation prompted numerous attempts to change
836 Rule 22 to lower the threshold required for cloture. In fact, the passage of civil rights
837 reform became deeply entwined with cloture reform.

838 By the 1950s it had become virtually a biennial ritual to attempt cloture reform
839 at the beginning of a new Congress. Only three attempts to change Rule 22 were
840 successful however.

841 The first occurred in 1949 when the Senate adopted a compromise proposal that
842 allowed for the application of cloture to any measure, motion, or matter pending before

843 the Senate, excepting a motion to take up a rules change in exchange for raising the
844 threshold for invoking closure to two-thirds of the entire membership.

845 Prior to this reform, it was not clear that cloture was even applicable to several
846 important items of Senate business, including nominations.

847 The second reform occurred in 1959 when the Senate adopted a resolution that
848 changed the cloture threshold to two-thirds present and voting, permitted cloture to
849 apply to rules changes, and explicitly affirmed in the rules that the Senate was a
850 continuing body.

851 The third reform occurred in 1975 when the cloture threshold was changed to
852 three-fifths of the Senate membership. However, two-thirds of the chamber would
853 still be necessary to invoke cloture on a proposal to change the rules.

854 During the many attempts to reform Rule 22, opponents of reform resorted to
855 strategies of obstruction to inhibit the attempts, taking advantage of the fact that
856 resolutions to change the rules themselves could be filibustered. Thus reform efforts
857 often involved attempts to establish precedents via rulings from the chair that would
858 enable a simple majority to invoke cloture on proposed rules changes at the beginning
859 of a Congress.

860 The only time that such a precedent was established was during the reform
861 attempt of 1975 but the precedent was reversed a few days later by a vote of the
862 Senate as part of a compromise.

863 To conclude, it is generally accepted that the contemporary Senate has become
864 a supermajoritarian institution. The foundation for the supermajority Senate was laid
865 with the adoption of the cloture rule in 1917 and its refinement in 1975. However,
866 between 1917 and 1975 the Senate did not have the supermajoritarian character that is
867 has today.

868 Neither the use of filibusters nor the use of the cloture was a part of the Senate's
869 day-to-day functions. However, toward the end of this period, the stage was set for
870 filibusters and cloture voters to become routine in the Senate, marking a fundamental
871 and profound change in the operation of the institution.

872 Thank you, Mr. Chairman. I look forward to the Committee's questions.

873 [The prepared statement of Mr. Wawro attached]

874 Chairman Schumer. Thank you, Mr. Wawro.

875 Mr. Dove.

876 **STATEMENT OF ROBERT B. DOVE, PARLIAMENTARIAN EMERITUS, U.S. SENATE**

877 Mr. Dove. Thank you, Mr. Chairman and members of the Committee. I am
878 particularly pleased to be here with Professor Binder. We both teach classes at George
879 Washington. I use her text in my class and I tell my students that the reason that I
880 want them to read the text and to read her conclusions are that I so profoundly disagree
881 with them. I think they should see both sides of it.

882 But I am not an opponent of the Senate filibuster. The reason that I am not I
883 think comes from the three periods that I worked for United States Senate. First from
884 1966 to 1986, I was in the Senate parliamentarian's office working first under the
885 parliamentarian who hired me, Floyd Riddick, and then under Murray Zweben, and then
886 the final six years of that period I was the parliamentarian.

887 In that period of 20 years, I must say my views on the filibuster changed, and
888 they were probably as influenced by anyone as much as by Floyd Riddick. Floyd

889 Riddick was a student of the Senate. He came to found the Daily Digest in the 1940s,
890 became assistant parliamentarian in 1951, and was the reason I was at the Senate.

891 I had done my PhD under the same professor at Duke that he had worked under.
892 I feel like I was schooled at his knee as he talked about what was happening with the
893 filibuster in that period. Some very interesting things were happening with regard to
894 the filibuster in that period.

895 The year after I came the Vice President of the United States, Hubert Humphrey,
896 and the Senator from South Dakota at that time, George McGovern, came up with a
897 strategy to change the filibuster rule, a strategy which would involve the Vice President
898 ruling that a resolution which had not yet been adopted would be enforced by the chair,
899 a resolution to change the filibuster rule, and it would be enforced on the basis that a
900 point of order against it had been tabled.

901 I did not see the logic of the situation at the time but I must say I was young and I
902 really thought this was a way of cutting the Gordian knot, a phrase that Senator Javits
903 used on the floor, and was secretly behind it. The parliamentarian was not, and the
904 Vice President was not ruling based on the advice of the parliamentarian.

905 The Vice President did so rule. The Vice President was overturned by the
906 Senate so that attempt came to naught.

907 Two year later in 1969 in the final days of Vice President Hubert Humphrey's
908 time as Vice President, he came up with another way of changing Rule 22. He said
909 from the chair that if a cloture motion was voted on, quote, at the beginning of the

910 Congress which had never had any significance in the Senate in the past and the vote
911 was by majority, that he would rule that cloture had been invoked on a rules change,
912 and he so rule. And once again the Senate overturned him. So that attempt came to
913 naught.

914 Then in 1975 Vice President Nelson Rockefeller together with Senator Walter
915 Mondale of Minnesota and Senator Pearson of Kansas managed to do what Vice
916 President Hubert Humphrey and Senator McGovern had tried to do only they did it
917 successfully this time or I would say semi-successfully.

918 Yes, the Vice President ruled that the resolution could not be debated and for
919 days the Senate had no debate but it had votes, and the only way the Vice President
920 was able to shut that down was to start refusing to recognize Senators.

921 I had some qualms about that at the time. Evidently the Vice President had
922 qualms about that because he came back two weeks afterward to apologize to the
923 Senate for refusing to recognize Senators. But of course at that point it was a little
924 late. The rule had been changed.

925 What I saw after that was that a significant minority of the Senate feeling that
926 they have been crushed in an illegitimate fashion began to look for holes in the cloture
927 rule. There were holes in the cloture rule. They were demonstrated in 1977 in a
928 filibuster on the Natural Gas Act and it was not until 1979 that the cloture rule was
929 amended to end those holes by putting an overall cap on the post cloture period of 100
930 hours and then later in the mid-80s a 30-hour cap.

931 Those changes basically were pursued and achieved in the normal course of
932 things. What I remember about the filibuster are two instances. One was a fight very
933 soon after the 1975 filibuster rule had been changed. A fight over a Senate seat from
934 New Hampshire. A fight between John Durkin and Louis Wyman.

935 And having just changed the filibuster rule to make it 60, there was the view that
936 the Democrats who then have controlled 62 seats in the Senate would probably be able
937 to ram through the seating of John Durkin with their 62 votes and cloture but they were
938 not because three Democrats went off the reservation and refused to vote with them.

939 So that election contest ended with the seat being declared vacant. A new
940 election occurring which John Durkin, the Democrat, won. And I will contrast that with
941 the fight in the House over that McCloskey seat from Indiana when basically the
942 Democrats rammed through the seating of someone that the Republican minority felt
943 was being illegitimately seated and I frankly the scars of that lasted for years.

944 I like the Senate of 1975 which refused to do that to seat John Durkin better than
945 what the House did with the McCloskey seat.

946 [The prepared statement of Mr. Dove follows:]

947 Chairman Schumer. Thank you, Mr. Dove.

948 Last but not least, Mr. Bach.

949 **STATEMENT OF STANLEY I. BACH, RETIRED, SENIOR SPECIALIST IN THE LEGISLATIVE**
950 **PROCESS, CONGRESSIONAL RESEARCH SERVICE**

951 Mr. Bach. Thank you, Mr. Chairman, Senator Bennett, and members of the
952 Committee. It is a great pleasure and honor to be back before the Committee after an
953 absence of many years and particularly to be in this company. I have great respect for
954 the scholarship of Professor Binder and Professor Wawro. And as for the gentleman to
955 my immediate right he said that he learned at Dr. Riddick's knee. I think I can say that
956 most of what I know about the Senate I learned at Bob Dove's knee when I was just a
957 boy. So I am particularly happy to be in the company of my teacher.

958 Much of what I was going to talk about already has been covered in one way or
959 another in the statements that have already been made, so I can abbreviate some of
960 that.

961 Basically what I want to do is to focus on the more recent period in Senate
962 history and essentially to remind members of this Committee of some developments
963 and trends with which I am sure you already are familiar.

964 First as has been noted, since the mid-70s, there have been three formal
965 changes in Rule 22 and no changes since. The 1975 adoption of the current
966 requirement to invoke cloture of three-fifths of the Senators duly chosen and sworn has

967 been mentioned as has the amendment that came four years later to impose a 100-hour
968 cap on post cloture consideration.

969 Before then and since, there has always been the limit of one hour of debate per
970 Senator after cloture has been invoked, but during the period after 1975, we saw the
971 growth of what became known as the post cloture filibuster which led to the imposition
972 of the cap on consideration as well as on debate 100 hours of post-cloture
973 consideration.

974 Then in 1985, I think as part of the resolution to authorize television coverage of
975 the Senate's floor proceedings, the 100-hour cap was reduced to a 30-hour cap. In a
976 sense that was the dog that did not bark. The 1985 amendment to Rule 22 evoked very
977 little controversy, very little contention, probably because between 1979 and 1985 the
978 Senate had never actually used all 100 hours. In fact, when I retired from CRS in 2002,
979 the Senate had not at that point actually used all of the 30 hours that are available
980 under the current rule. I understand that is no longer the case but it had been as of
981 the early years of this decade.

982 In addition, there have been a several important developments affecting the
983 Senate's precedents and practices that I do want to touch on briefly. Bob Dove
984 mentioned the 1977 debate on the natural gas deregulation bill. I sort of cut my teeth
985 on Senate procedure by trying to explain to myself everything that had happened to
986 that bill.

987 In the course of the Senate's consideration of that bill, a series of rulings were

988 made which vested considerably more power and discretion in the hands of the
989 presiding officer.

990 Much of this has become less relevant today because of the 100-hour and then
991 the 30-hour cap on post-cloture consideration, but under those precedents the
992 presiding officer actually was empowered to rule as dilatory such matters as
993 amendments, certain motions, quorum calls, points of order, and appeals of rulings of
994 the chair.

995 So it was really quite an extraordinary moment. Fortunately it has not been
996 necessary to invoke those precedents very often since.

997 In regard to changes in practice, I would want to emphasize two developments.
998 One is the greater incidence of cloture motions and votes in relation to the motion to
999 proceed.

1000 The second is the greater incidence of cloture motions and votes in connection
1001 with the three motions that can be necessary for the Senate to send a bill to conference
1002 with the House.

1003 Let me give you a few numbers. With regard to the motion to proceed, from
1004 1983 through 2006, there was an average of eight cloture motions per year filed on
1005 motions to proceed.

1006 During the following two years, 2007 and 2008, that average jumped from about
1007 eight to about 30 per year. That is a significant development by anyone's reckoning.

1008 I do not have similar data with respect to the motions to go to conference. All I
1009 can say is that at the beginning of this new millennium my colleagues and I at CRS were
1010 aware that these three normally routine steps that typically were taken by unanimous
1011 consent could, if required, be taken as three separate motions, each of which would be
1012 fully debatable under the Senate's rules.

1013 We wondered if and when this storm cloud on the horizon would actually break
1014 over the Senate and I think we have begun to see that happen.

1015 Now let me draw your attention briefly to two tables in my prepared statement
1016 on pages 8 and 10. The table on page 8 documents the number of cloture motions
1017 that have been filed in the Senate. If you compare the 1960s with the 1980s and then
1018 with the current decade--which is not yet over and so the data for which remains
1019 incomplete--the number of cloture motions filed in the Senate jumped from 28 in the
1020 1960s to 207 during the 1980s to more than 435 during the present decade--one cloture
1021 motion for every member of the House of Representatives.

1022 Another way of slicing reality is to look not at the number of cloture motions
1023 filed and voted on, but on the number of discrete items of legislative and executive

1024 business that provoked one or more cloture motions because, as you know, you can
1025 have multiple cloture motions on a bill in addition to the cloture motions on the motion
1026 to take up the bill, on the motions to send it to conference, on the conference report,
1027 and so on.

1028 That is addressed briefly in the table on page 10. Again if we compare the
1029 same three decades of the 1960s, the 1980s, and the current decade, the number of
1030 items of business that gave rise to one or more cloture motions grew from 16 in the
1031 1960s to 91 in the 1980s to 223 during the decade that is not yet completed.

1032 Mr. Chairman, I think there is a lot to be said for a bicameral legislature in which
1033 somewhat different decision rules are associated with each house.

1034 The House of Representatives, as Senator Roberts has emphasized, is
1035 unquestionably a majority-rule institution. In the House there is really not much need
1036 for the majority to compromise with the minority if the majority is sufficiently unified to
1037 provide 218 votes from among its own membership. Nor for that matter is there much
1038 incentive for the minority to work with the majority if the alternative is an effective
1039 campaign issue that the minority thinks it can use to become the new majority after the
1040 next election.

1041 If I can conclude with one further thought, Mr. Chairman, the dynamics of the
1042 Senate obviously are different, so but let me ask a not entirely rhetorical question, and
1043 that is, why do Senators filibuster? If the purpose and intent of a filibuster is to
1044 exercise a minority veto over legislation or a nomination or whatever, then I think

1045 defending recent practice is, in my view, an up-hill climb.

1046 If, on the other hand, the objective of filibustering or the threat of filibustering is
1047 to give the majority an incentive to take better account of policy interests and
1048 preferences that it might if the majority were left solely to its own devices, then I think
1049 filibustering becomes much easier for me to justify.

1050 So as the members of this Committee think about the subject of today's hearing
1051 and ask where do we go from here or is there anything that we need to do about this, I
1052 think a useful starting point is to ask whether the usual purpose of filibusters today is
1053 more balanced legislation or no legislation at all.

1054 Thank you very much.

1055 [The prepared statement of Mr. Bach follows:]

1056 Chairman Schumer. Thank you. I just want to thank our four witnesses. This
1057 hearing is a little different than the ones we usually have in that we went into a lot of
1058 history. I think it was great and helpful.

1059 Let me begin with a few questions. I am going to try to limit the questions to
1060 five minutes each because we do have a vote at noon.

1061 The first question I guess is for Mr. Bach. Using your distinction which I think is
1062 a valid one, could you draw a distinction between filibusters of nominees because you
1063 cannot really compromise the nominee per se as opposed to filibusters on legislation?
1064 One of the things that frustrates us is that just about every nominee, I named some of
1065 them before, even when they pass out of Committee by unanimous vote are

1066 filibustered.

1067 Mr. Bach. You start with the easy one, Mr. Chairman. The last time I was in
1068 this room was to attend the 2003 hearing on S.Res 138 which the Committee then
1069 reported.

1070 There are two distinctions I think to be drawn between filibustering on legislative
1071 business and filibustering on nominations. First, as you say, you cannot compromise
1072 on a nomination. So I think the threat of filibustering a nomination becomes
1073 particularly important because what you want to try to do is to use your influence
1074 before the President actually submits the nomination. You want that negotiation to
1075 occur in advance.

1076 The other difference in a sense makes filibustering on nominations more
1077 justifiable than filibustering bills because the bill you enact today you can amend or
1078 repeal tomorrow. If you discover you made a mistake on a bill you live with that
1079 mistake only as long as it takes for the Congress and the President to recognize it.

1080 When you confirm a judicial nominee, on the other hand, it is an appointment
1081 during good behavior and that can last for decades. It is essentially impossible to
1082 remedy a mistake on a judicial nomination whereas you can remedy mistakes on
1083 legislation much more easily.

1084 Chairman Schumer. Right. That cuts against your first point.

1085 Mr. Bach. Yes.

1086 Chairman Schumer. To Mr. Wawro and Mr. Dove. So there was a period in

1087 1975 where the chair ruled and that held. And then I think one mentioned that the
1088 actual resolution that was passed had so many holes in it that people were
1089 required--can you fill us in a little more particularly, Professor Wawro, but I would like to
1090 hear from Mr. Dove too, about those few days. You called it, I do not know, I think Mr.
1091 Dove said it was more than a few days, between the ruling of the chair initially and the
1092 actual rule that was passed.

1093 Mr. Wawro. I have the exact dates in my written statement. The resolution
1094 in question was Senate Resolution 4, and by this time, as I said in my statement, there
1095 was essentially a biennial ritual where senators tried to pass cloture reform by seeking
1096 rulings from the chair to invoke cloture by a majority.

1097 Prior to this reform attempt, there had not been a committed majority in the
1098 Senate who wanted to establish a precedent that would enable majority cloture on a
1099 rules change.

1100 When the precedent that was established, it was established by a very narrow
1101 vote, 51 to 42. My reading of the situation is that after the precedent was established
1102 that Senators were concerned about what they had done and it was an unanticipated
1103 result to an extent.

1104 There was a filibuster that ensued after the precedent had been established that
1105 tried to prevent the resolution from moving forward. It was several days later. I do
1106 not recall the exact date that but a compromise was worked out whereby the cloture
1107 would be changed to three-fifth of the Senate except for a rules change which still

1108 required two-thirds of the Senate. But the Senate did actually go through the exercise
1109 of reversing the precedent and then voting for cloture by a supermajority.

1110 Chairman Schumer. In a sense that is because they had buyers' remorse?

1111 Mr. Wawro. That is my reading of the situation. There was also some
1112 concern about how long the filibuster that followed the establishing of the precedent
1113 would have lasted.

1114 Chairman Schumer. Mr. Dove and Mr. Bach, just your comments on that brief
1115 period.

1116 Mr. Dove. The majority leader at the time was Senator Mike Mansfield, and he
1117 had a lot of questions frankly about what was happening on the Senate floor. It was
1118 on his suggestion that the Senate backup and by unanimous consent in effect undo
1119 what they had done and then do it in the normal course of things.

1120 There was indeed a feeling that perhaps what the Senate had done had some
1121 problems.

1122 You said holes in the rule they adopted.

1123 Chairman Schumer. I think you mentioned that.

1124 Mr. Dove. The holes were not in the rule they adopted. The holes were in the
1125 rule as it existed because just changing the number, that is all they did in 1975 was
1126 change the number, had nothing to do with the fact that if you wanted after cloture to
1127 extend the time you could do it very easily through votes, through having amendments
1128 read, and it was two Democratic Senators, Senators Abourezk of South Dakota and

1129 Metzenbaum of Ohio who demonstrated what two Senators could do on natural gas
1130 filibuster as they filed I believe 800 amendments. And after a week of either voting or
1131 quorum calls, they had used about three minutes of their one hour and it was clear that
1132 post-cloture filibuster could go on for months.

1133 Chairman Schumer. You agree with Mr. Dove. I see you are nodding your
1134 head, Mr. Bach. I do not want to go over my time.

1135 Mr. Bach. What Mr. Dove is pointing to are the elements of the post-cloture
1136 filibuster which then were the impetus for the imposition of the consideration caps that
1137 came in 1979 and 1985.

1138 I also think a point that deserves emphasis is that a number of the changes in the
1139 cloture rule that have taken place have been the result of compromise: change in one
1140 direction combined with change in another direction. I think what happened in 1975
1141 affected the question of who was going to have how much leverage in the negotiations
1142 for the compromise that eventually resulted.

1143 Chairman Schumer. Thanks. I want to thank the witnesses. I just want to
1144 say because I will not speak again that it is clear from the history that some people try to
1145 say the filibuster is fixed, unchanging, going way back if not from the Constitution from
1146 the early days, and that is clearly not so. Your testimony makes that very clear.

1147 Senator Bennett.

1148 Senator Bennett. I am a late arrival. If either of my colleagues wants to go
1149 ahead first I will be happy to yield to either one of them.

1150 Senator Roberts. Unless you would rather we go first.

1151 Senator Bennett. I am always ready to speak. You know that. It is in a

1152 Senator's genes.

1153 Chairman Schumer. Senator Bennett.

1154 Senator Roberts. I have already gone way over my time as described by the

1155 chairman. So please.

1156 Senator Bennett. All right. It is probably a good thing that Senator Roberts

1157 and I are sufficiently separated by space so we will not be confused for one being the

1158 other. We each get recognized as the other as we walk these hollowed halls.

1159 I have been fascinated by the historical review and have a little bit of history of

1160 my own to put here because my father was a Senator from 1951 through 1974. So the

1161 change you are talking about occurred just after he left the Senate. All the time he was

1162 here it was two-thirds of the Senators present and voting.

1163 The maneuvering to influence the outcome had to do with how many Senators

1164 you could keep off the floor as much as it did with how many people you could get to

1165 vote the way you wanted. Many times that was part of the legislative strategy.

1166 We know it is going to embarrass you if you vote this way or that way and you

1167 can accomplish what we want by not showing up and that will be less embarrassing to

1168 you back home with your constituents.

1169 So I think the rule change that said it is a constitutional supermajority of all the

1170 Senators duly sworn is a step in the level of accountability for one's position with

1171 respect to a piece of legislation. So I would applaud that change on that basis.

1172 Mr. Bach, I am interested in your dichotomy here which I agree with that if it is
1173 used strictly for obstruction, it is different than if it is used to try to get a bipartisan
1174 solution, and without getting into any of the details of where we are right now, I will say
1175 that in this present Congress we have seen examples of both where it was used
1176 absolutely to stop a piece of legislation and it was used absolutely to force the majority
1177 to come to the table in an effort to get a good piece of legislation.

1178 I will not fill in the gaps of the kind of legislation am talking about. But I would
1179 like your reaction. You are political junkies or you would not be teaching political
1180 science wherever it is you are.

1181 My experience is that there is a political price to be paid either way. That is,
1182 that a party that decides we are going to use the filibuster simply for obstruction runs a
1183 political risk of being punished by the voters who say we do not like that or can reap a
1184 political benefit when voters say we want you to stop this at all costs, and it becomes a
1185 political strategic decision on the part of the leader of the minority party.

1186 Do we run the risk of losing the approbation of the people by being seen as
1187 obstructionist or do we gain the approbation of the people by being seen as principled
1188 and standing up against a bad piece of legislation?

1189 So that ultimately the public will make the decision and punish or reward the
1190 party on its strategic decision to use the filibuster and therefore the filibuster becomes a
1191 significant weapon, two edged sword if you will, in the arsenal of politicians that gives it,

1192 in my view, a kind of legitimacy as something that should stay in the rules.

1193 I would like your reactions to that particular view.

1194 Ms. Binder. I would answer your question this way, the question really who
1195 pays the cost for obstruction or with perceived obstruction, I typically say that majorities
1196 tend to be blamed for failure to govern rather than minorities feeling the cost of public
1197 concern.

1198 Having said that, it may depend quite a bit on what issue is at stake and how
1199 much the public is paying attention, and on a highly charged issue in a period where
1200 partisans tend to divide, majority party members or partisans tend to blame the
1201 minority for blocking and partisans of the minority tend to blame the majority for trying
1202 to cut off the minority.

1203 Of course that is the problem we face in the Senate today on very highly charged
1204 issues. Stepping back though, more often than not it does seem that majorities are
1205 quite often blamed for failure to govern.

1206 Senator Bennett. Thank you.

1207 Chairman Schumer. Time is up but we will let them answer.

1208 Senator Bennett. Yes, any others?

1209 Mr. Bach. Senator Bennett, I take your point. There will be instances, I am
1210 sure, where it is politically advantageous to be Horatio at the bridge, trying to kill
1211 legislation entirely.

1212 I do not think that is going to happen very often though; take the health care

1213 debate or the current debate over financial regulation.

1214 If you ask the American people if they are satisfied with the status quo, in both
1215 cases they will probably say no. So there is underlying support for some kind of
1216 legislation, and I think that even when the intent of a filibuster is the kill, it very often
1217 may be caste in terms of an attempt to get the majority to compromise.

1218 And the problem that we have from the outside is that we are not really able not
1219 being able really to judge the merits of the arguments from each side, the minority
1220 saying that the majority refuses to compromise, and the majority claiming that the
1221 minority asks too much.

1222 We cannot judge that unless we are in the room when these discussions are
1223 going on. What I think we can say is that this is what the media will report as partisan
1224 bickering and that does not serve the reputation of the Senate well.

1225 Mr. Wawro. If I could give a political sciencey answer to your question, I do
1226 not think we have a very good answer to this question because, despite all of the
1227 research that have been devoted to the filibuster, we lack in-depth studies about how
1228 it plays out in the court of public opinion. We do have surveys that go back to the
1229 1930s that ask questions about filibusters and filibuster reform but we do not have the
1230 kind of systematic analysis that I, as a political scientist, would like to see to reach a
1231 definitive conclusion about who really pays the price in a very general sense.

1232 Senator Bennett. Thank you very much.

1233 Chairman Schumer. Senator Udall.

1234 Senator Udall. Thank you, Senator Schumer.

1235 Back in 2005 Senator Hatch wrote an article and I want to just quote a portion of
1236 that and get our first two witnesses opinion, maybe to the two parts of it.

1237 He said in the article, "The Senate exercises its constitutional authority to
1238 determine its procedural rules, either implicitly or explicitly. Once a new Congress
1239 begins, operating under existing laws implicitly adopts them by acquiescence. The
1240 Senate explicitly determines its rules by formally amending them, and then the
1241 procedure depends on its timing. After Rule 22 has been adopted by acquiescence it
1242 requires 67 votes for cloture on a rules change. Before the Senate adopts Rule 22 by
1243 acquiescence, however, ordinary parliamentary rules apply and a simple majority can
1244 invoke cloture and change Senate rules."

1245 And then he says in conclusion.

1246 "Both conservative and liberal legal scholars agree that a simple majority can
1247 change Senate rules at the beginning of the new Congress." end quote.

1248 I am wondering, Professor Binder and Wawro, do you have an opinion on
1249 Senator Hatch? Do you agree with Senator Hatch on that point?

1250 Ms. Binder. I think the answer comes down to how the Senate itself interprets
1251 that power. As the debates in 1975 played out over whether the Senate is a
1252 continuing body or not, we see votes both ways.

1253 We have seen a majority endorse precisely the position of Senator Hatch in
1254 2005, and we have seen perhaps a buyers' remorse stepping back from that once

1255 everyone understands the implications of living in a Senate where a majority can do
1256 that. It is clearly technically feasible and it has been politically feasible but the
1257 questions at any given moment is the Senate willing to take that vote again.

1258 Senator Udall. So basically what you are saying is that it is a constitutional issue
1259 and then the Senate determines constitutional issues, the Senate itself as a body
1260 determines that constitutional issue?

1261 Ms. Binder. Yes, because the Constitution says the House and Senate shall
1262 adopt their own rules.

1263 Senator Udall. Yes, Article I Section 5 of the Constitution says each house may
1264 determine the rules of its proceedings. So it all flows from out of that.

1265 Ms. Binder. Yes, and the question is in the Senate at any given time is a
1266 majority willing to endorse that interpretation of the rules.

1267 Senator Udall. There is nothing in the Constitution about a filibuster or the
1268 Rule 22 provision, things like that.

1269 Ms. Binder. Correct.

1270 Senator Udall. Please.

1271 Mr. Wawro. I would just say one of the great dilemmas of democratic
1272 institutions is that it is important to have rules that constrain the behavior of individuals
1273 who are members of those institutions but members of those institutions can change
1274 their own rules.

1275 The Senate did put in its rules a provision that explicitly affirmed that it is a

1276 continuing body. The Senate did this as part of a compromise that reformed rules
1277 concerning the filibuster. But if the Senate wanted to change its rules with respect to
1278 that provision, it can do that.

1279 There may be some issues with the parliamentary maneuvering that might be
1280 necessary to make such a change and some concerns about departures from Senate
1281 tradition that this might entail. But the Senate has in its power to make the decision
1282 itself over what its rules are at any given moment.

1283 Senator Udall. By a majority vote?

1284 Mr. Wawro. By a majority vote simply because the Senate operates on the
1285 basis that precedents can be established by simple majorities to fill in gray areas in
1286 the rules--aspects of procedure that are not clearly established either in the
1287 Constitution or in the Senate's rules. All you need is a majority vote to be able to do
1288 that.

1289 Senator Udall. Let me ask you both one additional question on a long-standing
1290 constitutional principle and that principle is that one Congress cannot bind a subsequent
1291 Congress.

1292 The simple example could be that you do it in terms of rules or you do it in terms
1293 of a piece of legislation and say in the legislation we pass that no future Congress can
1294 change this law unless you have 75 votes. That is a long-standing constitutional
1295 principle, is it not?

1296 Ms. Binder. I am not a constitutional scholar. So I would probably send that

1297 to Mr. Dove.

1298 Senator Udall. I want to ask him a different question.

1299 Ms. Binder. I will answer it as a political scientist. The chamber has the right
1300 to set its rules. Sometimes rules get entrenched because the rules themselves cause a
1301 barrier to changing them. It is not unconstitutional to create a barrier that is very hard
1302 to overcome.

1303 Chairman Schumer. One more question.

1304 Mr. Dove. Could I answer that?

1305 Senator Udall. Yes.

1306 Mr. Dove. Because I helped right the Congressional Budget Act of 1974 which
1307 binds the Senate in spite of the fact that it is not re-adopted every Congress. If your
1308 premise is correct, that that Congress in 1974 had no right to bind the Congress of
1309 today, then the whole reconciliation process is gone.

1310 Senator Udall. It is not my premise. It is in Supreme Court cases repeated
1311 over and over and over again.

1312 Mr. Bach, do you have an opinion on that? And please on any of the things said
1313 earlier.

1314 Mr. Bach. There is an interesting and tricky problem here which is a problem of
1315 both principle and practice.

1316 In the House of Representatives as many of you know, one of the things the
1317 House does on the first day of the new Congress is to adopt its rules. But that leaves

1318 this question: under what rules does the House debate the resolution to adopt its rules?

1319 This is not a problem in current practice because it has all become routinized.

1320 But there was a day especially back in the 19th Century when the House could go on for
1321 days and days trying to elect a speaker which it would do before adopting its rules.

1322 As I recall, the precedents of the House try to deal with this by saying that the
1323 House is then governed by general parliamentary law, just as Senator Hatch referred to
1324 ordinary parliamentary rules.

1325 Well, I would really enjoy finding the book which tells me what general
1326 parliamentary law is or what the ordinary parliamentary rules are. Roberts Rules?
1327 Mason's Rules? Whose rules? So you run into a logical problem: how are you going
1328 to conduct the deliberations over what the rules of the House or the Senate will be if
1329 they are adopted anew at the beginning of a Congress?

1330 Senator Udall. They do not seem to have much problem in the House. Thank
1331 you for your courtesies, Senator Schumer.

1332 Chairman Schumer. No. My pleasure. The question I am just going to ask
1333 and leave out hanging there is to Mr. Dove. Maybe he can answer it for the record.

1334 You mean the Senate could not undo, that we are bound to the Budget
1335 Reconciliation Act? It keeps going from Senate to Senate if we do not change it but let
1336 us say and you can answer this in writing, all of you. Let us say the Reconciliation Act,
1337 the Senate by 51 votes said we are undoing it? What would happen?

1338 Mr. Dove. Of course they can do that but they have not done anything about

1339 either reconfirming it or trying to change it since 1974.

1340 Chairman Schumer. It is a different issue though according to Senator Udall's
1341 question if they tried to change, it as opposed to it continuing without an attempt to
1342 change it. Right?

1343 Mr. Dove. Certainly they can change it, yes.

1344 Chairman Schumer. Senator Alexander.

1345 Senator Alexander. Thank you, Mr. Chairman.

1346 Mr. Bach, unless the majority believes the minority is willing to kill a bill, how can
1347 it persuade the majority to take it seriously in changing the bill? When you said a
1348 filibuster might be all right if you are only going to do it to improve the bill but the way
1349 you get the attention of the majority is to say, if you do not, we will kill it.

1350 Mr. Bach. This is the issue that Senator Bennett raised earlier, what is the
1351 minority's true intention, to kill or to compromise.

1352 Senator Alexander. How are you going to determine that? That is just a
1353 matter of human nature.

1354 Mr. Bach. No one on the outside can determine that. That is a question that
1355 only Senators can determine in looking at what they and their colleagues are doing.

1356 Senator Alexander. But is it not a fairly simple rule of human nature that if you
1357 do not think I am serious you are not going to pay any attention to me.

1358 Mr. Bach. Yes, it is.

1359 Senator Alexander. We all know that. Look at the financial reform bill debate

1360 right now. Forty-one Republicans have signed a letter saying, you know, we might
1361 filibuster this if you do not let us have some participation in making it a better bill.

1362 If the Democrats think there is no chance to we will do that--the only reason we
1363 think we are getting a chance at some participation is they think we might actually do
1364 that.

1365 So, Ms. Binder, your view, well, let me read this again. Senator Reid said, the
1366 majority leader, when talking about 2005 which has been mentioned a couple of times,
1367 Bill Frist was pursuing a rules change that would kill the filibuster for judicial
1368 nominations. Once you open that Pandora's box, it was just a matter of time before a
1369 Senate leader who could not get his way on something moved to eliminate the filibuster
1370 for regular business as well, and that, simply put, would be the end of the United States.

1371 Do you disagree that?

1372 Ms. Binder. The planned of the 2005 use of the constitutional option were
1373 quite different than the other options.

1374 Senator Alexander. Do you agree or disagree with Senator Reid?

1375 Ms. Binder. I am not sure how quite to answer that one. It is clearly within
1376 the power of the Senate to reform by ruling as opposed to changing the rules.

1377 Senator Alexander. So you agree there is nothing unconstitutional about
1378 having filibusters, right?

1379 Ms. Binder. Correct.

1380 Senator Alexander. But we are going down the basic function of the Senate

1381 and Senator Reid, a majority leader, been here a long time, says, this is the end of the
1382 Senate if we change the filibuster rule.

1383 Do you not disagree with that? I mean the whole point of your testimony
1384 seems to me to be is that the filibuster is bad for the Senate.

1385 Ms. Binder. The point of my testimony is to point out that the filibuster was
1386 not an original constitutional feature. That it has been changed and that the majorities
1387 have struggled with minorities over time to put supermajority rules in place.

1388 Senator Alexander. I heard that but you characterized it all as obstructionism
1389 instead of protection of minority rights. Did you think it would have been a good idea
1390 in 2005 for President Bush to be able to put just a steady series of super conservative
1391 judges on the court without the Democrats being able to slow that down?

1392 Ms. Binder. I thought at the time that the proposed use of nuclear
1393 constitutional option to reinterpret precedent was the wrong way to use the nuclear
1394 option.

1395 Senator Alexander. So you opposed changing the filibuster in 2005?

1396 Ms. Binder. Through the mechanisms that were proposed at the time which
1397 would be reinterpret Rule 22 in a way that did not match up with the actual language of
1398 Rule 22.

1399 Senator Alexander. But you wrote an article, did you not, saying filibusters are
1400 a great American tradition in 2005?

1401 Ms. Binder. That was the title put on by the editor.

1402 Senator Alexander. I have that happen to me too. It just seems to me your
1403 testimony is very much at variance with that of Senator Byrd's though about the Senate,
1404 Senator Reid's thought about the Senate, and that may be fine but you think they are
1405 wrong as a matter of history, and my sense is that you see anything other than a
1406 majority view as obstructionism.

1407 Ms. Binder. On the first, we disagree about how history is read. I read it
1408 differently than Senator Byrd.

1409 Senator Alexander. Mr. Dove, if the filibuster were ended, what would be the
1410 way in which the Senate then could continue to protect minority rights?

1411 Mr. Dove. It could not.

1412 Chairman Schumer. On that note we would go to Mr. Roberts.

1413 Senator Roberts. Well, if it could not, we would be in a hell of a shape, and the
1414 reason I say that is that I was interested in Bob Dove's reference to the situation in the
1415 State of Indiana back in the 1980s where Frank McCloskey was the incumbent and Rick
1416 McIntyre was the challenger. The secretary of state of Indiana certified Mr. McIntyre
1417 as the duly elected member from that district.

1418 However, when it came time to seat him, he was denied that and the matter was
1419 referred to the House Administration Committee of which I was a member, and a
1420 subcommittee was sent to Indiana to see if they could not come up with the precise
1421 number of votes that would determine the election.

1422 Mr. Leon Panetta, who got his first experience in covert activities, was the

1423 Democrat leader and Mr. Bill Thomas, who had a reputation of certainly stating his
1424 opinion, was the minority representative.

1425 As soon as Mr. McCloskey went ahead in the recount, the exercise was
1426 terminated and it was decided that Mr. McCloskey had won. Mr. Thomas brought
1427 back several voters who were not counted, stood them in the House Administration
1428 Committee room and tried to point out that this was a very severe violation of the rights
1429 of the State of Indiana and certainly Mr. McIntyre.

1430 That really caused a ruckus and Republicans were wearing buttons at that times
1431 saying thou shalt not steel. The speaker at that time, Tip O'Neill said you will not wear
1432 these buttons on the floor of the House which we did anyway.

1433 My remarks were such that I said I will take off my button now so I can speak
1434 but, and then went into my not tirade but certainly my point of view.

1435 That meant that we left the dock of the secretaries of state all over the country
1436 declaring who would be the winner and who would not, and that the House
1437 Administration Committee, if the vote were close enough, less than one percent, or one
1438 percent, the committee would decide that, and obviously the majority would declare
1439 the majority candidate the winner.

1440 Then came Idaho and Idaho had a very close vote and the Republican lost and
1441 the Democrat won, and I was appointed to go to Idaho along with a member of
1442 California to recount the election.

1443 I made the suggestion to Bob Michael and to Billy Pitts at that particular time his

1444 stalwart assistant that that was not what we should do as a party. That if we left the
1445 dock of secretaries of state determining elections, we were in deep water indeed and
1446 that that would not be in the best interest of the House, and so we denied or we
1447 declined to go, and obviously the Democrat won and we had quite a discussion as to
1448 why Mr. Roberts did not want to go to California by some of our stalwarts.

1449 Basically we walked out of the House of Representatives, and we walked out for
1450 several days. That was not a good thing and it also led to elections of leadership in the
1451 House who basically said we were declaring war on the majority.

1452 I am not sure that was a good thing. As a matter of fact, I am very sure that
1453 was not a good thing but that is what happened and it got into a very partisan kind of
1454 situation to say the least. I would not want to see that happen in the Senate of the
1455 United States.

1456 Mr. Dove, the current majority of 59 members is the largest held by either party
1457 in over 30 years. I think I am right. Is that correct?

1458 Mr. Dove. The answer is yes.

1459 Senator Roberts. Would you say that those Congresses with smaller majorities
1460 were more or less functional than the current Congress?

1461 Mr. Dove. Okay. To me all Congresses are functional. The Senate rules are
1462 perfect, as I was told by Floyd Riddick; and if they are all changed tomorrow, they are
1463 still perfect.

1464 So I do not want to start qualifying Congresses by being functional but I do

1465 emphasize the difference in the fight over the New Hampshire seat and the Indiana seat
1466 and say it was the filibuster that saved the Senate from what the House did with the
1467 McCloskey seat.

1468 Senator Roberts. Already you have gotten to my point that I was trying to bring
1469 up.

1470 Chairman Schumer. Time has expired, Pat.

1471 Senator Roberts. I thought you would say that as a matter of fact.

1472 Chairman Schumer. I know that people would like to do other questions but
1473 this type of hearing does lend itself to written questions because lots of these are
1474 historical. So on behalf of the Rules Committee, I am going to first thank our witnesses
1475 for their presentations this morning.

1476 They have certainly helped us better understand the history of the Senate as it
1477 relates to the filibuster and I want to thank my colleagues on the Rules Committee who
1478 were here today. This is really a good opening hearing.

1479 We will continue on the subject including getting to more specific proposals
1480 Senator Udall and others have those for future hearings.

1481 The record will remain open for five business days for additional statements and
1482 questions from Rules Committee members. And since there is no further business
1483 before the Committee, the Committee is adjourned subject to the call of the chair.

1484 [Whereupon, at 12:05 p.m., the Committee was adjourned.]